United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

76-1420

B P/S

In The

United States Court of Appeals

For The Second Circuit

UNITED STATES OF AMERICA,

Appellee,

vs.

KENNETH RAYMOND CHIN and ELIZABETH JANE YOUNG, a/k/a ELIZABETH JANE YOUNG CHIN,

Appellants.

On Appeal from the United States District Court for the Eastern District of New York.

REPLY BRIEF FOR APPELLANT KENNETH RAYMOND CHIN

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LUTZ APPELLATE PRINTERS, INC.
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POINT I

NEITHER THE CHARGE TO THE JURY NOR THE EVIDENCE PRESENTED SUPPORTS A FINDING THAT CHIN IS GUILTY OF RECEIVING A FIREARM IN VIOLATION OF 18 U.S.C. §922(a)(3).

The Government's interpretation of the statute is the strongest argument against sustaining the conviction. Its arguments with reference to the "receiving" charge and count are self-contradictory; within this contradiction is easily seen the errors below. Realizing that the words of Congress cannot be ignored, the Government postulates three ways in which a weapon might be "obtained" by a person so as to bring him within the strictures of this Section.

> Obviously, what the language means is that to be liable under this section, the act of transporting or obtaining must have been committed without the State of residence of the defendant, either directly by the defended or have been caused to be committed by the defendant, 18 U.S.C. §2(b), or have been procured by the defendant, 18 U.S.C. §2(a).
>
> Appellee's Brief, 44.

Defendant did not intend to suggest that 18 U.S.C. §2 culpability was precluded by his reading of the statute. Under the proper set of facts and circumstances, a

person might be found guilty of having aided or abetted or caused the transportation or receipt of a firearm. The gravamen of defendant's argument was that the Court's failure to include this unique element of this crime in its charge was error. The Government has failed to point to any place in the charge in which the Court explained to the jury that in order to find Chin guilty, it was necessary to find one of the three modes of participation in the activity preceding the receipt. The simple fact is that this does not appear anywhere in the charge.

Acceptance of Appellee's verbiage as to the ways of culpability under this section makes clear that the charge itself was insufficient to charge a crime. Nowhere in the charge is reference made to <u>any</u> of the ways in which the Government now states that Chin might be liable. The Court stated that guilt could be predicated upon finding that Chin "received the weapon and that when he received it, he knew that the weapon was unlawfully transported." (A-100) (Appelle's Brief, 48). Not that he obtained it, or procured it -- but merely that he was aware of it!

Even more fatal to the Government's argument is its reliance upon this very section of the charge to support

its contention that there was sufficient evidence to convict. The Government argues that Chin received the weapon in New York, saying

> Although there was no further direct evidence, the fact that Chin possessed the rifle soon after it was imported into New York would, as the count charged, permit the inference that Chin had 'received the weapon and that when he received the weapon he knew that the weapon was unlawfully transported in the State of New York'.

Appellee's Brief, 48.

Proof of Chin's guilt is found, according to the Government, by stringing together a series of facts and viewing cumulatively the inferences to be drawn from each. Omitted is any indication of what the inferences might be. We submit that the reason is that the inferences to be drawn from these facts are non-supportive of guilt. For example, Chin's registration of two rifles gives rise to the inference that Chin registered any rifles which he had in his possession. Therefore, he did not possess this particular weapon. The "joint statement about their interest in guns" (Appellee's Brief, 48) implies nothing further than that they were both interested in weapons -- leaving completely unresolved and untouched the threshold question of who between them

could be justifiably deemed to have possession of the particular weapon in question.

The element unproven at trial is the basis upon which Chin could be said to have possessed that particular weapon. All that was proven was the bare fact that he was a tenant in the apartment.

And, once again, even if one accepted the inferences as sufficiently probative of a fact, the fact which the Government states has been proven is receipt with knowledge. This is not a crime within the purview of the statute.

POINT II

THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE CONVICTION OF CHIN ON THE TRANSPORATION COUNT.

In its attempt to salvage the transportation count, the Government again disproves its own argument. The evidence, it says, although close, was sufficient to support a finding of aiding and abetting in the transporation of the firearm. Defendant, of course, disputes this and reiterates his

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position that the evidence falls far short of that quantum necessary to sustain a conviction. The theory of the prosecution was, and remains that Chin in some way aided and abetted in the transporation. Yet, in its attempt to refute defendant's claim that the Court erred in charging that finding Young not guilty by reason of failure to prove residence does not exculpate Chin, the Government claims that the Court charged 18 U.S.C. §2(b) -- liability by reason of causing someone to commit an act.

The Court in its charge did repeat the wording of 18 U.S.C. §2(b) (A 95); however, no further reference was made to a theory of culpability on these grounds, nor was this theory of culpability ever defined. cf. 1 Devitt & Blackmar §12.04. The reason for this lack was, of course, that the Government had not proceeded on this theory and the facts did not support it. In his summation, the Assistant United States Attorney stated the theory of prosecution in terms of aiding and abetting and further used the language most closely associated with aiding and abetting, to wit "affirmative step to knowingly associate himself," (Tr. 658) "procuring" (Tr. 659, See also Government's definition of 18 U.S.C. §2(a), Appellee's Brief 44), "associate himself with the venture" (Tr. 659).

This Court has recently rejected an attempt to justify a passing reference to a crime as sufficient to charge that crime where the proof did not suggest it. United States v. Robinson, 545 F.2d 301 (2d Cir. 1976). So, too, should this Court reject that attempt here. Thus, the concededly erroneous statement of the Court which allowed the jury to convict Chin of aiding and abetting even if it found Young not guilty cannot be salvaged by an eleventh hour change in theory of prosecution.

Turning, once again, to evidence presented in support of this Count, the Government has done nothing but to repeat the evidence presented and to rely on inferences to complete the proof. No attempt is made to refute the argument that such an inference is insufficient to support a conviction and to sustain this conviction would be violative of due process.

Given the Government's concession as to the closeness of the sufficiency question, defendant cannot help but wonder why the Government has seen fit to include in its Supplemental Appendix a newspaper article and photographs,

unnecessary to support any of its arguments. The potential inflammatory effect of these items and the fact that they are irrelevant to the issues leads to the conclusion that they were placed before this Court for effect, not substance.

The lack of candor of the Government is perhaps best illustrated by Appellee's Appendix, 9, where the Government captions an article from the N.Y. Times with headlines from the N.Y. Daily News. The headline as it appeared in the N.Y. Times read "NO LINK TO HIROHITO SEEN IN ARREST OF 2" (N.Y. Times, October 7, 1975).

CONCLUSION

THE JUDGMENTS OF CONVICTION MUST BE REVERSED AND THE INDICTMENT DISMISSED.

Respectfully submitted,

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